Supreme Court of the United States

October Term, 1956

No. 286

KREBIOZEN RESEARCH FOUNDATION, Et Als,
PETITIONERS,

vs.

BEACON PRESS, INC.,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are Amendment 1 and Amendment 14, Section 1, of the United States Constitution and Article XVI of the Constitution of The Commonwealth of Massachusetts. They are set forth in Appendix A of this Brief.

STATEMENT OF THE CASE

The petitioners, a foundation and three individuals, brought a bill in equity which had one single purpose: to prevent by injunction the printing of a book called "*Krebiozen*" *The Great Cancer Mystery*. The book was written by Dr. George D. Stoddard (R. p. 2), formerly President of the University of Illinois, (p. 7 of Exhibit A of petitioners' bill). The respondent, Beacon Press, Inc., which publishes books and sells them throughout the United

States and foreign countries (R. p. 2), tested by demurrer the petitioners' right to obtain such an injunction and assigned as grounds therefor the following:[1]

"1. Because of the provisions of the Constitution of the United States and of the Constitution of the Commonwealth of Massachusetts, this court has no jurisdiction or power, by restraining order or injunction, to prevent the defendant from publishing the book described in the plaintiffs' bill.

"2. Irrespective of the provisions of the Constitution of the United States and of the Constitution of the Commonwealth of Massachusetts, this court has no jurisdiction or power, by restraining order or injunction, to prevent the defendant from publishing the book described in the plaintiffs' bill.

"6. The plaintiffs have not stated in their bill such a cause as entitles them to any relief in equity against the defendant." (R. p. 12, 13.)

The Superior Court entered two decrees: An interlocutory decree entered on July 6, 1955, sustaining the respondent's demurrer and a final decree entered on July 14, 1955, which dismissed the bill of complaint and dissolved the restraining order. (R. p. 13, 14.) Petitioners appealed to the Supreme Judicial Court of The Commonwealth of Massachusetts from these two decrees. (R. p. 15.) The Supreme Judicial Court entered a rescript on May 3, 1956 affirming both decrees, a certified copy of which was filed by the petitioner in the present proceeding.

"Krebiozen" is the name of a product of the petitioners which they call a drug and which they say is useful in the treatment of cancer and may be a cure for cancer and which is administered to patients suffering from cancer all over the nation. (pp. 8 to 30 of Exhibit A.)

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[1] Demurrer ground 3, 4 and 5 were waived. R. p. 13.

The petitioners alleged in their bill that the respondent's book would say that Krebiozen is worthless, and that the book would question the ability, ethics and integrity of the doctors who are petitioners, would assail the methods used by the petitioners in testing their "drug" and would label Krebiozen as a secret remedy and even question the very existence of it. The petitioners said that all this would have the effect of impeding further scientific investigation of Krebiozen and would adversely affect its commercial marketability in foreign countries where it had been licensed for sale. They also alleged that the book would state that the petitioners know that their remedy is worthless.

To meet the expected statements in the book, the petitioners insisted that they were competent and ethical experts; that they and their foundation had conducted scientific investigations of the highest order; that their remedy was an important discovery in medicine; and that the respondent, through its book, sought to attack them and their product maliciously.

The petitioners also alleged that they had made repeated offers before bringing this suit to prove the inaccuracy and libelous nature of the statements which they said would be published by the respondent, and that the publication of the respondent's book would cause irreparable damage to the trade name of their "drug", Krebiozen.

The petitioners also claimed that unless publication of the book was enjoined, the distribution of the book outside of the Commonwealth could not be effectively stopped.

The petitioners prayed for temporary restraining orders and a preliminary and a permanent injunction.

The Supreme Judicial Court of The Commonwealth of Massachusetts upheld the Superior Court's decision sustaining the respondent's demurrer on the ground that while the Massachusetts Court now has jurisdiction in equity un-

der some circumstances to relieve against libel by injunction, such relief was properly denied the petitioners because of an important public interest, and also on the ground that the respondent's rights to freedom of speech and press under the federal and state Constitutions required that the injunction sought by the petitioners be denied.

The respondent takes this opportunity to point out that the petitioners at page 5 in their statement of the case state as a fact that "the Respondent further published and distributed this book in bound volume form, which is in substantially the same form and tenor as the galley proof form, and the Respondent is still publishing and distributing for sale copies of said book. . . ."

Nowhere in the record does it appear that the book was published in substantially the same form and tenor as the galley proof and such a statement is wholly unwarranted. Neither does it appear from the record that the book is still being published and distributed and is a continuing and unjustified attack upon the petitioners. For aught that appears the book, "Krebiozen—The Great Cancer Mystery", in its present form (and in the only form published) greatly varies from the galley referred to in the petitioners' bill of complaint. The respondent does not go outside of the record to make any assertion with respect to the form of the book as published.

REASONS FOR DENYING THE WRIT

1. The respondent is dissatisfied with the petitioners' presentation of the alleged federal question as it is stated on page 2 of the petition. The petitioners under the heading "Jurisdiction" assert that "the validity of the Petitioners' rights and privileges guaranteed under the 14th Amendment to the United States Constitution is drawn into question." The only assertion of constitutional rights or

privileges disclosed in the record is the claim, which was set up by the respondent, relating to the respondent's constitutional rights of freedom of speech and press. The respondent submits that no constitutional rights and privileges of the *petitioners* are involved in this case. Further argument on the point appears below.

The petitioners, under the headings "How Federal Question is Presented", and "Question Presented" (page 2 of petition) assert that the Supreme Judicial Court decided the case on the ground that the Superior Court had no jurisdiction. This is not an accurate statement. The plain language of the demurrer (R. p. 12) reveals that the question of the jurisdiction of the court was only one of several questions raised by the demurrer. The plain language of the opinion of the Supreme Judicial Court (Petition, p. 12) reveals that that court expressly decided that the Superior Court *did* have jurisdiction but was justified in refusing to exercise its injunctive powers in this case because of considerations of public policy and the constitutional rights of the respondent.

In addition the petitioners, under the same two headings, state that the decision of the highest Massachusetts Court was based upon the constitutional amendment protecting freedom of speech and imply that no other basis for decision was involved. In fact questions of freedom of speech and press, as guaranteed by state and federal constitutions, were raised and decided. Moreover, as will be discussed below, the decision of the highest state court was based upon alternate grounds one of which involved no constitutional or federal question whatsoever.

In addition, although the petitioners under the heading "Question Presented" confine the constitutional question to that which concerns freedom of expression, they insert under the heading "How Federal Question is Presented" an allegation of deprivation of property without due process

of law. This allegation, coupled with their previous assertion under the heading "Jurisdiction" that their rights and privileges under the 14th Amendment to the United States Constitution are drawn in question, creates the impression that a second Federal Question is involved in this case. This the respondent disputes.

2. The decision of the Supreme Judicial Court of The Commonwealth of Massachusetts was based upon alternate grounds, only one of which was federal in nature. The other ground, expressly set forth in the opinion of that Court, is clearly an adequate, independent and tenable ground, sufficient in and of itself to support the judgment, and solely dependent on considerations of state law in respect of which the Supreme Judicial Court should be the final authority. The firmly established principle that the Supreme Court of the United States will not review a state court decision based upon such an alternate non-federal ground requires no citations. The Court has stated its reason for the application of that sound principle many times.

In the Superior Court in order to prevent an injunction which would have prohibited the publication of its book, the respondent demurred and relied on three reasons to support the demurrer.[1]

A. Rights of freedom of speech and press under the state and federal constitutions.

B. Lack of jurisdiction or power of the court to enjoin publication irrespective of any constitutional guaranty.

C. Failure of the petitioners to set forth such a cause of action as would entitle them to relief in equity.

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[1] The demurrer originally assigned six reasons in support thereof. Reasons 3, 4 and 5 were waived. See Interlocutory Decree R. p. 13.

In its demurrer the respondent questioned the jurisdiction of the court but also specifically questioned the power of the court to grant injunctive relief. The petitioners erroneously treat the opinion of the Supreme Judicial Court as though it held only that the Superior Court had no jurisdiction. The petitioners treat the opinion of the Supreme Judicial Court as if the second and third grounds of the demurrer did not exist.

The opinion of the Supreme Judicial Court stated that while its more recent decisions established that equity jurisdiction is extended to cases of libel and slander, in this case there should be no injunction. The Court said:

"Whether it [equity jurisdiction] is to be exercised, however, depends as in every case where the jurisdiction is invoked to protect interests of property or personality, or both, upon all the relevant circumstances. It is apparent that the constitutional protection of free speech and public interest in the discussion of many issues greatly limit the area in which the power to give injunctive relief may or should be exercised in defamation cases. [Citations omitted.]

"We need not pause for a more precise definition than our cases now afford of the line dividing the special situations in which equity should exercise its jurisdiction to restrain the use of words from those in which public policy or constitutional provisions stay its hand. . . ." (Petition, p. 19.)

And in its concluding paragraphs the Court said:

"'Where an important public interest would be prejudiced, the reasons for denying an injunction may be compelling.' [Citations omitted.]

"The constitutional protections are clear and controlling, but were they absent, the weight, in the balance, of the public interest in the discussion of cancer cures would

be sufficient basis here for the denial of an injunction." (Petition, p. 26.)

Thus for reasons of public policy as well as for constitutional reasons, the Supreme Judicial Court held that in this case the courts of the Commonwealth ought not to provide injunctive relief.

Surely it is the right of the Supreme Judicial Court to define the limits within which inferior courts of equity in Massachusetts ought to operate with respect to the injunctive process. And it cannot be said that such limits may not depend on reasons of public policy. In this case no time-honored common law remedy is denied the petitioners. Indeed, the remedy they sought, if granted, would be unique. While the Supreme Judicial Court stated that "equity jurisdiction does extend to cases of libel and slander" it by no means follows that the injunctive powers must be exercised in all libel and slander cases.

We submit that the Supreme Judicial Court has decided, for valid reasons not dependent upon any constitutional guaranties, that the petitioners' bill did not set forth such a cause as entitled them to the relief they sought and that the Superior Court had no power to enjoin in this case. The Supreme Court of the United States ought not to review this non-federal question.

Still erroneously insisting that the only ground relied on by the Supreme Judicial Court was complete lack of jurisdiction, the petitioners argue that the question of jurisdiction is a constitutional question and only a constitutional question. Such an assertion is made in the face of the plain language of the demurrer and the opinion of the Supreme Judicial Court to the contrary.

The petitioners assert that the Supreme Judicial Court erred in applying the law in the case of *Near* v. *Minnesota*, 283 U.S. 697. The petitioners point out that the Minnesota

case expressly excludes considerations of the existence of equity jurisdiction to protect private rights in defamation cases. The petitioners quote part, but only part, of the Supreme Judicial Court's opinion at pages 5 and 6 in their petition in order to make the argument that the Supreme Judicial Court misapplied the law of the Minnesota case.

The respondent points out that the Supreme Judicial Court of Massachusetts said,

> "This case under the Constitution of the United States is substantially controlled by *Near* v. *Minnesota*, 283 U. S. 697."

It is, therefore, perfectly clear that the Supreme Judicial Court of Massachusetts applied the law in the Minnesota case only insofar as constitutional questions were involved and did not hold that *Near* v. *Minnesota* controlled the Krebiozen case in all its aspects.

3. The petitioners claim that they were deprived of property without due process of law. It does not appear that any such question was raised in the record or passed upon by the state courts. The record discloses that the only constitutional issue on which the jurisdiction of the Supreme Court of the United States might conceivably be invoked is that which was raised by the respondent, namely: freedom of speech and press. The assertion that the petitioners have been deprived of property without due process of law is not properly before this Court.

In the petition at page 8, the petitioners state that

> "In its opinion the Court purports to have weighed the evidence as to whether the Petitioners' property rights or the public interest in this [Krebiozen] matter is paramount without ever holding any hearing on the merits of these conflicting interests."

The petitioners seem to be complaining that they have been deprived of an opportunity to have a hearing on the merits of their bill. Even if the question of denial of due process of the law were open to the petitioners on this record, for the state courts to have decided and disposed of an action on demurrer without a hearing on the merits is certainly not a deprivation of property without due process of law. Actually the petitioners can never be in a better position than when the allegations of fact are admitted by demurrer.

The Supreme Judicial Court in holding that the discussion of a purported cancer cure is a matter of great public interest was stating a conclusion that is a matter of common knowledge and which is warranted by the record. It is doubtful if the conclusion could be influenced in any way by a trial on the merits.

The petitioners' allegations of fact describing the nature and extent of their private interests in their drug were, because of the demurrer, considered by the Supreme Judicial Court in the most favorable light possible. Again no trial on the merits would have enhanced the value of the private rights.

The petitioners have no basis to complain that the conclusions of the state courts were unjustified. If they had any cause to complain it would not be a federal question. Due process of law does not require that a court of equity provide injunctive relief for every slander and libel case that comes before it.

4. The federal question in this case which was raised by the respondent was the question of free speech and press as guaranteed by state and federal constitutions. The respondent's assertion that those constitutional guarantees afford immunity from restraint against publication in this case was accepted by the Supreme Judicial Court and was advanced by that Court as an alternate ground of its decision. We submit that that issue was correctly decided by

the Supreme Judicial Court, and we rest upon the reasoning of that Court.

The petitioners contend at page 6 of their petition that the Supreme Judicial Court was stating in the Krebiozen decision that the Superior Court had jurisdiction to issue the injunction prayed for but that constitutional rights of free speech cut across the equity jurisdiction and eliminated it.

The respondent asks that this theory of the Krebiozen decision be rejected. The plain language of the opinion negates such an interpretation completely. As we have pointed out, the Supreme Judicial Court separated constitutional grounds from public policy principles and sustained the demurrer on each ground without making either ground dependent upon the other.

The petitioners also seek to distinguish the case at bar from the free speech cases cited by the Supreme Judicial Court in the Krebiozen opinion. The petitioners state that the cited cases, which include *Near* v. *Minnesota*, involve restraint of speech by executive governmental agencies. The petitioners believe that the Supreme Court of the United States should in the instant case make a distinction between rules of law that prevent governmental agencies from exercising censorship and a rule of law which, as the petitioners say, provides "a guarantee of the liberty to intimidate by speech and writings". (Petition, p. 7)

For answer to this contention the respondent refers to the statement by Professor Chaffee quoted in the Krebiozen opinion (See Petition, p. 22). Professor Chaffee concludes with this statement "One man's judgment is not to be trusted to determine what people can read. . . . So our law thinks it better to let the defamed plaintiff take his damages for what they are worth than to entrust a single judge (or even a jury) with the power to put a sharp check on the spread of possible truth."

CONCLUSION

In conclusion, the respondent submits that the petition for certiorari should be denied on the ground that the Supreme Judicial Court of The Commonwealth of Massachusetts has correctly interpreted and applied the constitutional provisions of freedom of speech and press; that there are no other constitutional questions open on the record presented with the petition; and that the decision of the Supreme Judicial Court denying injunctive relief on the ground of public policy is sound and contravenes no federal principle of law.

Respectfully submitted,

FRANK B. FREDERICK
Attorney for the Respondent

Hervey W. King

Victor H. Kazanjian

Johnson, Clapp, Ives & King
50 State Street, Boston, Mass.

Of Counsel

APPENDIX A.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of The Commonwealth of Massachusetts

Article XVI

Liberty of the Press; Freedom of Speech. The liberty of the press is essential to the security of freedom in a state: It ought not, therefore, to be restrained in this commonwealth. *The right of free speech shall not be abridged.*